90-20

No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF HAWAII,

Petitioner,

v.

JOHN KALANI LINCOLN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTIONS PRESENTED

1. Whether, under *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, the court below erred in reversing Respondent's murder conviction on the ground that the admission, at Respondent's second murder trial, of prior cross-examined testimony from Respondent's first murder trial, violated Respondent's rights under the Confrontation Clause and the Fourteenth Amendment because, in the court's view, the earlier testimony was (a) rendered unreliable by evidence that the admitted testimony had been recanted and (b) this asserted unreliability was not (i) overcome, for purposes of admissibility, or (ii) cured by cross-examined testimony proving that the recantation was false, other rulings permitting impeachment of the prior testimony, and cautionary instructions concerning the testimony's reliability?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioner State of of Hawaii respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Hawaii entered in this action on March 8, 1990, as modified by the order entered below on March 29, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 789 P.2d 497 (Haw. 1990), and is reprinted in Appendix "A." The oral ruling of the Circuit Court of the Second Circuit, State of Hawaii, admitting the testimony of Anthony Kekona, Jr., at Respondent's second trial for

murder, entered January 26, 1990, is reprinted in Appendix "E." Other orders related to the case, and the mandate, are reprinted in Appendices "B," "C," and "D."

JURISDICTION

The opinion of the Supreme Court of Hawaii was entered on March 8, 1990, and an order granting in part and denying in relevant part Petitioner State of Hawaii's motion for reconsideration was entered on March 29, 1990. An order denying Respondent's motion for reconsideration filed March 29, 1990, was entered on April 6, 1990, along with the court's mandate. Under 28 U.S.C. § 2101, and this Court's Rule 13, the time in which this Petition may be filed extends at least to and including June 27, 1990, and this Petition was timely filed. Although the judgment permits the State to retry Respondent, the judgment is final for purposes of this Court's jurisdiction. *See, e.g., New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

The grounds for reversal presented here were timely presented to the Supreme Court of Hawaii in the State's Answering Brief on appeal at 29, 37-49, No. 13771 (Haw. Oct. 4, 1989), and in the memorandum in support of the State's Motion for Reconsideration and Clarification at 6-20, No. 13771 (Haw. Mar. 19, 1990), or were otherwise passed upon by the Supreme Court of Hawaii. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 217-23 (1983). The State Supreme Court also did not provide "a plain statement that the decision below rested on an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032,

1044 (1983). The manner in which the issues here were raised or passed upon by the state courts, and the propriety of federal review under the rule of *Michigan v. Long*, are briefed more fully at pp. 8-9, 10-11, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (West 1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The issue in this case is whether the Confrontation Clause was violated by the admission, in a criminal case, of concededly otherwise admissible cross-examined prior testimony because there is some evidence that the testimony has been recanted.

Here, the Supreme Court of Hawaii, based upon hitman Anthony Kekona's 1982 naked out-of court statements that he "lied" in his detailed testimony at John

Kalani Lincoln's first trial for the murder of Paul Warford, held that Kekona's 1980 testimony was so "unreliable" that it could not be used at Lincoln's second murder trial. The court did so even though Kekona, under oath in 1984, and on cross-examination, freely admitted that the recantation was false and was simply a ruse to win a trip home from the federal penitentiary in Lewisburg, Pennsylvania, to the island of Maui. The issue in this case is whether, despite the extensive steps taken to avoid prejudice to Lincoln's confrontation rights, the Supreme Court of Hawaii, by erecting a virtually insurmountable presumption of unreliability in cases involving allegations of recantation, was right in holding that admission of Kekona's past testimony would amount to a "mechanistic application of the hearsay exceptions" and thus improper under federal caselaw construing the right of confrontation.

1. This case arises out of the brutal shooting, on May 4, 1978, of Paul Warford, David Blue, and Harriet Savage, by Anthony Kekona, Jr., at the Kaleialoha Condominium in Honokowai, Maui. Warford and Blue died from the shooting. Savage, who lived, testified that Kekona, on the night of the slayings, said he was "paid to do this," and Kekona, after being arrested along with an accomplice, Patrick Hawkins, and pleading guilty to murder and attempted murder, implicated Respondent John Kalani Lincoln as the middleman in a chilling murder-for-hire scheme in which, the State's evidence showed below, Lincoln hired Kekona to kill Paul Warford at the behest of Warford's wife, Sue. At the time of the killings, Sue was the beneficiary of nearly four hundred thousand dollars in insurance policies on Paul Warford's life, and was having an affair with Ike Sanga, a Honolulu police officer

to whom Respondent Lincoln was related, and with whom Lincoln had been associated. *See* Pet. App. at 2-3; Tr. 1-23-89 at 64-65 (Savage test.); Tr. 1-30-89 at 85 (Sanga test.); Tr. 1-31-89 at 17 (Connors test.).

2. During Lincoln's 1980 trial on two counts of murder and one count of attempted murder, Kekona testified in detail to Lincoln's involvement in the "hit," involvement that was confirmed by telephone toll records linking Kekona to Lincoln in the spring of 1978, two different confessions Lincoln made to Maui police, in which Lincoln stated, in effect, that he regretted the death of David Blue and the near death of Harriet Savage, and that "my deal" or "trip" was "with Warford," as well as other admissions on taped conversations with Kekona, after Kekona had been captured, in which Lincoln admitted that those higher up in the plot were "family." *See State v. Lincoln*, 3 Haw. App. 107, 111 n.1, 113 n.4, 116 (1982).

3. Kekona's 1980 trial testimony, viewed favorably to the state, established that Lincoln agreed to pay Kekona $10,000 to kill Warford, Blue, and Savage (Tr. 4-1-80 at 444), the timing of the contract (*id.* at 445), and that Lincoln had come to Maui toward the end of April, gave Kekona pictures of Warford, Blue, and Savage (*id* at 447-48, 453), showed Kekona the layout of the Kaleialoha apartments (*id.* at 448-49), and plotted Kekona's route of escape (*id.* at 449). Kekona testified that Lincoln drew a map for the "hit" (*id.* at 450), gave Kekona "a week" to prepare for it (*id.* at 450), and promised Kekona that he would "take care" of bail and not only provide "one lawyer" if Kekona were caught, but kill any witnesses to the crime (*id.* at 451). Kekona testified, further, that, at the

initial Maui meeting, Lincoln paid Kekona one or two thousand dollars in $100 bills, out of which Kekona paid $500 to Hawkins (*id.* at 451, 454). Kekona confirmed that he placed a collect call to Lincoln's Oahu home on May 5, 1978, to inform Lincoln that "the job is done" and "I did what you told me to do" and "I think I going to get caught" (*id.* at 456). Kekona also testified that Lincoln encouraged Kekona to fly to Oahu to facilitate his escape from the Hawaiian Islands, and that Lincoln, first at Kekona's ex-wife's residence, and then at another of Lincoln's relatives', gave Kekona about $5200 in further payment for the "hit" (*id.* at 459). Kekona confirmed the basis of his cooperation leading to the tape recording of Lincoln's statements in 1979, and said that he kept silent until his trial because he expected Lincoln to kill the witnesses (*id.* at 456) and hire Kekona counsel (*id.* at 474). During this testimony, Lincoln was subjected to cross-examination exceeding 100 pages of transcript (*id.* at 476-572, 600-09). Based on the evidence at the first trial, a jury sitting in the Circuit Court for the Second Circuit, State of Hawaii, found Lincoln guilty of the murder of Paul Warford and David Blue, and of the attempted murder of Harriet Savage. The Hawaii Intermediate Court of Appeals affirmed, *State v. Lincoln*, 3 Haw. App. 107, 643 P.2d 807 (*"Lincoln I"*), and discretionary review was denied by the Supreme Court of Hawaii. *See* 64 Haw. 689 (1982).

4. On August 18, 1987, the United States District Court for the District of Hawaii issued a conditional writ of habeas corpus on the basis that the prosecutor at Lincoln's 1980 trial had made improper prejudicial references to Lincoln's refusal to take the stand in his own

defense. *Lincoln v. Sunn*, 674 F. Supp. 788, 791 (D. Haw. 1987). In the meantime, in November, 1982, Kekona, then incarcerated in the United States Penitentiary at Lewisburg, Pennsylvania, had made out an affidavit in which he "reaffirmed" as "true and correct" a previous conversation he had with Lincoln's counsel, in which he stated that Lincoln was not involved in the "hit thing," but instead was involved only in dealing marijuana. *See* Pet. App. "G." This affidavit led Kekona in 1984 to be recalled to Maui to a state proceeding seeking postconviction relief, at which time Kekona took the stand and recanted his recantation, stating, among other things, that the recantation was "a lie" and a way "to come home, you know, to see my parents" Pet. App. 30. At the 1984 postconviction proceeding, Kekona's retraction and his retraction of the retraction were subjected to extensive cross-examination (*id.* at 21-41), and relief was denied.

5. At Respondent's second trial for the murders of Paul Warford and David Blue, and the attempted murder of Harriet Savage, in January 1989, the Circuit Court for the Second Circuit, State of Hawaii, admitted Kekona's 1980 testimony after Kekona refused to testify following the Court's order so directing. Pet. App. 4. Noting that Kekona's counsel at the 1980 trial "had full opportunity to cross-examine Mr. Kekona," the trial court found the hearsay evidence admissible under the prior testimony exception set forth at Rule 804(a)(2), Haw. R. Evid., and "further[,] that the constitutional requirement as set forth in the United States Supreme Court cases on this subject had been satisfied." *See* Pet. App. "E." The trial court granted the defense virtual unlimited leeway in allowing impeachment of Kekona's 1980 testimony (*see, e.g.* Tr.

2-1-89 at 4-5 (allowing 1982 retraction to be admitted)), and issued an instruction advising the jury to view Kekona's original testimony with caution in light of Kekona's refusal to testify (Tr. 2-2-89 at 9-10). The court, over Lincoln's objection, admitted Kekona's 1984 cross-examined testimony bearing on the retraction of the retraction. *See* Pet. App. 21-41. An enormous array of interlocking evidence substantiating Lincoln's involvement and the veracity of Kekona's 1980 and 1984 testimony was presented in the three week trial. *See* State's Ans. Br. at 10-28, No. 13771 (Haw. Oct. 4, 1989). The jury, after several days' deliberation, returned acquittals on the charges involving David Blue and Harriet Savage, but convicted Lincoln as an accomplice in the murder of Paul Warford. Lincoln then appealed. *See* Pet. App. 3-4.

6. The Supreme Court of Hawaii reversed, concluding that the admission of Kekona's 1980 trial testimony "violate[d] Lincoln's constitutional right to confront his accuser." Pet. App. at 9. Arguing the Confrontation Clause issue was controlled by *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Mancusi v. Stubbs*, 408 U.S. 204 (1972)), the State had objected vigorously to reversal on confrontation grounds, as *Roberts* stated that, once, as here, unavailability has been shown, and " 'a hearsay declarant is not present for cross-examination at trial,' " prior statements can be admitted if " 'the evidence falls within a firmly rooted hearsay exception,' " including, specifically, " 'cross-examined prior-trial testimony.' " State's Answering Br. at 47, No. 13771 (Haw. Oct. 4, 1989) (*quoting Roberts*, 448 U.S. at 66 & n.8). The State vigorously contended that "[t]his case does not involve the issue of 'de minimus questioning' (*id.* (quoting *Roberts*)), and asserted

that vacatur would "reverse the Roberts analytic by allowing the unqualified inference of reliability for past cross-examined testimony to be 'rebutted' " (*id.*). The State also demonstrated that it was fully fair to permit the jury to weigh the credibility of Kekona's testimony, insofar as Lincoln "was permitted to introduce all of Kekona's subsequent statements . . . and to argue these evidentiary points" (*id.* at 42). Reasoning that no amount of protective measures would suffice, and that "the prior cross-examination of Kekona was rendered inadequate by subsequent events" the Supreme Court of Hawaii held that admission of Kekona's 1980 testimony was impermissible under this Court's precedents as a "mechanistic application of the hearsay exceptions" (Pet. App. 9), and viewed the case as similar to *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), in which uncross-examined grand jury testimony was excluded because it was deemed unreliable. Pet. App. at 8. The Court subsequently denied in relevant part the State's timely motion for reconsideration, although it permitted the State to retry Lincoln in light of its novel ruling. Pet. App. at 11.

REASONS FOR GRANTING THE WRIT

The judgment below does not rest upon an independent and adequate state ground and creates a gaping exception to the reasoning and logic of this Court's confrontation clause jurisprudence that merits review and reversal by this Court. Taken seriously, the Supreme Court of Hawaii's expansive reading of the reliability component of this Court's two-part test in *Ohio v. Roberts*, 448 U.S. 56 (1980), would make any instance in which a

live witness refused to testify impossible to rectify through the admission of the witness's past testimony, as the refusal of the witness to testify, like Kekona's post-1980 statements, provides a "subsequent" ground for impeachment that, under the lower court's logic, would render the "prior cross-examination" "inadequate." *See* Pet. App. at 8. This could not be the law. Because the ruling below is within this Court's authority to correct and presents a direct conflict with this Court's precedents, or, at the least, substantial questions that merit the Court's attention, the petition for review should be granted.

A. The Judgment Below Does Not Rest Upon an Independent and Adequate State Ground.

In seeking review here of the judgment below vacating Respondent's conviction for murder in one of Hawaii's most notorious crimes, Petitioner appreciates that this Court's first task is "to 'satisfy itself . . . of its own jurisdiction.' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). We are thus aware of, and subscribe to, the rule that this Court does not have jurisdiction over a state court decision that "rests on an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032 (1983) (per curiam). Since *Long*, however, this Court has held that dismissal is not required unless the ruling under review embodies "a 'plain statement' of the court's reliance on an alternative state-law holding." *Quinn v. Millsap*, 109 S. Ct. 2324, 2329 n.6 (1989). Although the state court below cited to the Hawaii Constitution in vacating Respondent's conviction (Pet. App.

2), properly construed, the judgment is amenable to this Court's corrective power.

Here, as in *Michigan v. Long* itself, the judgment below that Respondent's confrontation rights were violated is "interwoven with the federal law." 463 U.S. at 1040. Indeed, in its critical holding that affirmance would constitute an impermissible "mechanistic application of the hearsay exceptions" (Pet App. 9), the court cited to this Court's ruling in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and purported to follow the Sixth Circuit's lead in *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982). Nothing in the opinion below, or in the two Hawaii cases it cites, *State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974), and *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697 (1973), indicate, either as a general matter, or, in this context, that the Hawaii Constitution's confrontation clause, which in relevant part is identical to the Sixth Amendment (*see* Haw. Const. art. I, § 14), is construed more broadly than its federal counterpart, and, indeed, the court's analysis signifies that, on this front, the Hawaii constitutional provision "is construed in pari materia with the [Sixth] Amendment." *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987). Jurisdiction lies here.

B. Review Should be Granted to Correct the Supreme Court of Hawaii's Expansive Reading of the Reliability Component of this Court's Confrontation Jurisprudence.

Contrary to the judgment of the Supreme Court of Hawaii, the "prior cross-examination of Kekona" was not "rendered inadequate by subsequent events" for Confrontation Clause purposes.

Indeed, in condemning a "mechanistic" result, the Supreme Court of Hawaii created one in allowing exclusion of otherwise admissible hearsay whenever "subsequent events" give rise to new grounds for impeachment that cannot be exploited before the jury by live testimony because of a witness's recalcitrance.

Permitted to stand, the lower court's analysis would require suppression of vast categories of admissible proof that fall within the "firmly rooted hearsay exception[s]" that this Court has repeatedly held comport with the intent and purpose of the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. at 66.

In this case, there is no doubt that the well established exception for "cross-examined prior-trial testimony," *id.* at 66 n.8 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972)), was in play. As in *California v. Green*, 399 U.S. 149 (1970), the witness became recalcitrant at trial, making him unavailable, and his prior testimony was offered. That testimony was subject to extensive cross-examination, consisting of more than 100 pages of trial transcript. Under any plausible reading of this Court's decisions in *Roberts*, *Mancusi*, and *Green*, admission of the evidence was an appropriate accommodation of the basic purpose of trials conducted under the Due Process Clause – the search for truth – with the distinct procedural interests protected by the Confrontation Clause. The Supreme Court of Hawaii took no exception with the trial court's finding that, as a matter of Hawaii evidence law, the requirements of the past-testimony exception were met, and, on these facts, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical*

Center, 485 U.S. 80, 86 (1988); *see First English Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 n.8 (1987).

The ground relied upon below, that subsequent events may generate post-hoc grounds for challenging the adequacy of past cross-examination, is squarely foreclosed by this Court's precedents, or is sufficiently in conflict with the logic of those decisions so as to counsel review. Indeed, seen clearly, the judgment below imposes the burden of "undertak[ing] a particularized search for 'indicia of reliability' " in precisely those cases in which such searches have been ruled unnecessary. *Roberts*, 448 U.S. at 66, 72; *see Mancusi*, 408 U.S. at 213-16. As the State vigorously urged below, whether Kekona's past testimony could support a conviction went to weight, not admissibility, and while Lincoln clearly had a due process interest in placing before the jury the evidence of Kekona's recantation, that interest was clearly satisfied by the Circuit Court's generous rulings and instructions that Kekona's past testimony, in light of his subsequent actions, should be viewed cautiously.

Indeed, even on its own view that a fact-specific analysis of the "indicia of reliability" was counseled, the Supreme Court of Hawaii erected an insurmountable and arbitrary burden for the State that overlooked a central purpose behind this Court's contemporary construction of the Confrontation Clause: "the need for certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66. While citing to the fact that Kekona's retraction of his 1980 testimony was possibly motivated by "a desire to receive a free trip back to Hawaii from his mainland prison" (Pet. App. 8), the Court did not state how this factor cutting in favor of the reliability of the

1980 testimony should be weighed, or when, if ever, a witness's "subsequent" recalcitrance could ever be ignored when, as is always logically possible, the witness's desire to avoid live testimony leads to the conclusion that the witness did not believe his former testimony was fully truthful. Here, of course, Kekona's retraction *was* the subject of cross-examination at Respondent's 1984 state habeas proceeding, and this testimony (ironically, over Respondent's objection), *was* read to the jury. *See* Pet. App. 21-41. In light of this fact, the decision below amounts to the very sort of "mechanistic" result that the Supreme Court of Hawaii purported to condemn, for no matter how thoroughly, as a whole, Kekona's statements were cross-examined, the court's analysis dictates inadmissibility.

As this Court has repeatedly held, the jurisprudence that has grown up around the Confrontation Clause has "attempted to harmonize the goal of the Clause – placing limits on the kind of evidence that may be received against a defendant – with a societal interest in accurate factfinding." *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). Indeed, as the Court emphasized in *Bourjaily*, "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " *Id.* at 183. Here, in eroding nearly a century of precedent recognizing the "former testimony" hearsay exception, *see Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court of Hawaii fundamentally breached this teaching, and erected a virtually conclusive presumption of unreliability in cases of witness recalcitrance. This decision turns this Court's Confrontation Clause jurisprudence on its head.

Because of the conflict between this far-reaching decision and this Court's precedents, review should be granted.

CONCLUSION

For the reasons above, the Court should grant the Petition and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case down for plenary briefing and argument.

Respectfully submitted, June 27, 1990.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANI LINCOLN, Defendant-Appellant.

NO. 13771

APPEAL FROM THE SECOND CIRCUIT COURT
HONORABLE E. JOHN McCONNELL, JUDGE
(CRIM. NO. 5720(1))

MARCH 8, 1990
(Filed March 8, 1990)

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE HEEN,
IN PLACE OF PADGETT, J., RECUSED

CRIMINAL LAW – evidence – hearsay – Hawaii Rules of Evidence 804(b)(1).

The mechanistic application of hearsay exceptions is inappropriate where former testimony lacks indicia of reliability usually associated with sworn testimony.

CONSTITUTIONAL LAW – confrontation.

To allow the admission of former testimony by a now unavailable witness under Hawaii Rules of Evidence 804(b)(1) which lacks the indicia of reliability usually associated with sworn testimony violates a defendant's right under the Hawaii Constitution to confront his accuser as to subsequent events which have rendered that testimony unreliable.

OPINION OF THE COURT BY LUM, C.J.

This appeal stems from a retrial of Appellant John Kalani Lincoln ordered by the Federal District Court. Lincoln appeals from his new conviction of murder in violation of Hawaii Revised Statutes (HRS) §§ 707-701, 707-221, and 702-222.

Lincoln alleges numerous points of error in his appeal. We need to address only one, which is whether the trial court committed reversible error when it admitted into evidence the former testimony given in Lincoln's first trial by the trigger man in the shooting, Anthony Kekona, Jr., after the trial court found that Kekona was unavailable as a witness under Hawaii Rules of Evidence (HRE) 804 when Kekona refused to testify. Because we find that Kekona's former testimony lacked the necessary indicia of reliability and because Lincoln's rights under the Confrontation Clause of the Hawaii Constitution have been violated, we reverse.

I.

On May 4, 1978, Anthony Kekona, Jr., and Patrick Hawkins went to the Kaleialoha Condominium in Honokowai, Maui, where Kekona shot and killed Paul Warford and David Blue and shot Harriet Savage in the head wounding her severely. Hawkins, who had provided the gun Kekona used, was arrested almost immediately. Kekona was arrested several days later on Oahu.

Kekona pled guilty on two counts of murder and one count of attempted murder for which he was sentenced, respectively, to life imprisonment with possibility of

parole and 20 years in prison. Hawkins pled guilty to three counts of attempted robbery for which he received five years probation.

The day after his sentencing in July 1979, Kekona told his uncle, Robert Cordero, a Maui police detective, that he had been hired by John Kalani Lincoln to kill Warford, Blue and Savage.

II.

A.

Thereafter Lincoln was indicted by the Grand Jury on two counts of "murder for hire" and one count of attempted murder. Both Hawkins and Kekona testified on behalf of the State against Lincoln. These testimonies were read to the jury in Lincoln's retrial and is the subject of this appeal.

On April 12, 1980, a jury found Lincoln guilty of the two murders and attempted murder. The jury did not find Lincoln guilty of "murder for hire." He was sentenced to life with parole and twenty years in prison respectively.

In late 1982, Anthony Kekona, in a sworn affidavit which stated that Lincoln had no connection with the shootings and that Kekona's only connection with Lincoln involved marijuana transactions, recanted his testimony given at Lincoln's trial. When a hearing was held on this recantation, Kekona recanted his recantation and claimed he only wanted a free trip back to Hawaii from prison on the mainland to see his family.

After the 1987 reversal of Lincoln's conviction by the Federal District Court, the State decided to retry Lincoln.

B.

Eventually, a new jury trial was held commencing January 17, 1989. Kekona refused to testify for the State. Kekona demanded new concessions from the State for further testimony and also claimed his privilege against self-incrimination after not being offered immunity. Hawkins was unavailable to testify for the State since his probation has expired and he had moved to the mainland. The State did try to produce Hawkins through the Uniform Act to Secure Attendance of Witness from Without the State in Criminal Proceedings.

The former testimony of Kekona was read to the jury. The jury was advised of his retraction and his retraction of his retraction. The court allowed the former testimony under HRE 804(a)(2).[1] Likewise, the court allowed the

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[1] Rule 804(a) states in pertinent part:

Rule 804 Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(Continued on following page)

former testimony of Hawkins under HRE 804(a)(5) but in this appeal we need not address that aspect of the court's ruling. Lincoln objected very strenuously to the admission of the former testimony of Kekona, citing the fact that Kekona's behavior in the intervening years had been such as to cast serious doubts on the reliability of his former testimony. Lincoln argues that Kekona's action subsequent to his prior testimony rendered the prior cross-examination of him inadequate to support the admission of the prior testimony, and Lincoln was deprived of his right of confrontation. We agree.

III.

We have previously held that the erroneous admission of evidence may constitute error if a fair trial was thereby impaired or if that evidence resulted in substantial prejudice to the Defendant. *State v. Cummings*, 49 Haw. 522, 528, 423 P.2d 438, 442 (1967). We must also determine whether the admission of such evidence was harmless beyond a reasonable doubt in order to decide the question of whether or not the admission of former testimony under a hearsay exception to the Hawaii Rules of Evidence violated Lincoln's constitutional right to

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(Continued from previous page)

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

confront his accuser. *State v. Pookini*, 57 Haw. 26, 548 P.2d 1402 (1976).

In the present case, the trial court found that both Kekona and Hawkins were unavailable and admitted their former testimony from the first trial which was read to the jury even though the State was not able to assure the trial court that Kekona's testimony at the second trial would have been substantially similar to that in the first if he did not choose to testify a second time. Kekona's recantation and recantation of the recantation were also made known to the jury but, of course, Lincoln's counsel was unable to cross-examine him on these matters.

Generally, former testimony is admissible as an exception to the hearsay rule. Since it was adduced under oath and the opposing party had the opportunity for full cross-examination, former testimony is thought to be reliable and acceptable when the declarant is unavailable. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception); *State v. White*, 65 Haw. 286, 651 P.2d 470 (1982). Criminal defendants have a basic constitutional right to confront their accusers under both the Hawaii and United States Constitutions.[2] Under HRE 804(b)(1), the proponent of former testimony must establish that the witness is unavailable and that his unavailability has not been procured by the party seeking to use his former testimony *and* that the opposing party had a sufficient reason, motive, and opportunity to cross-examine the

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[2] Haw. Const., art. I, § 14; U.S. Const. amend. VI.

witness at the former hearing.[3] Former testimony is thus admissible and does not violate the confrontation clause if this test is met. *Roberts, supra.*

Hawaii case law also allows the admission of former testimony, if the witness is unavailable. Generally, the introduction of prior testimony does not violate the Confrontation Clause if there is sufficient proof of the unavailability of the witness. *State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974). Such testimony is admissible if the witness was under oath, the defendant and his attorney were present and had an opportunity to cross-examine the witness, the proceedings were before a judicial tribunal which recorded them properly, and the state was unable to procure the attendance of the witness after diligent efforts. *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697 (1973).

We find that here Kekona's former testimony lacks reliability. Kekona retracted his testimony under oath, retracted his retraction, and finally refused to testify at trial. His motives are unclear but may have included,

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[3] Rule 804(b)(1) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

among other things, a desire to receive a free trip back to Hawaii from his mainland prison as well as an attempt to strike a better deal with the State. We also find that the prior cross-examination of Kekona was rendered inadequate by subsequent events.

There is a federal case which is analogous. In *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), the court set out a test for determining the reliability of former testimony given before a grand jury which was sought to be admitted under Federal Rules of Evidence 804(b)(5) (same as HRE 804(b)(6)).[4] Although there was no cross-examination before the grand jury, the testimony was given under oath.

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[4] HRE 804(b)(6) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

> [9] Second the trial court must determine whether the substance of the grand jury testimony possesses "circumstantial guarantees of trustworthiness" equivalent to the other exceptions included in Rule 804. In making this determination the trial court should consider the *declarant's relationship with both the defendant and the government, the declarant's motivation to testify* before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, *whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination*. (Emphasis added).

Id. at 962.

We hold that the mechanistic application of the hearsay exceptions is inappropriate. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973).

The evidence against Lincoln is flimsy without the critical testimony of Kekona. Kekona's testimony was critical to the extent that we feel that, upon review of the record, its admission was not harmless beyond a reasonable doubt. To allow the former testimony which lacks the indicia of reliability usually associated with sworn testimony to be admitted in lieu of Kekona's live appearance violates Lincoln's constitutional right to confront his accuser as to subsequent events which have rendered Kekona's testimony unreliable.

Reversed.

Eric A. Seitz
for Defendant-Appellant

Steven S. Michaels
(John C. Bryant, Jr.,
with him on the brief),
Deputy Attorneys General
for Plaintiff-Appellee

/s/ H. Lum
/s/ Yoshimi Hayashi
/s/ J. Wakatsuki
/s/ Edward H. Nakamura
/s/ Walter M. Heen

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANT LINCOLN, Defendant-Appellant.

NO. 13771

(CRIM. NO. 5720(1))

MOTION FOR RECONSIDERATION

MARCH 29, 1990

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE
HEEN, IN PLACE OF PADGETT, J., RECUSED

(Filed March 29, 1990)

Upon consideration of Plaintiff-Appellee's Motion for Reconsideration and Clarification of Opinion filed March 8, 1990,

IT IS HEREBY ORDERED that the motion is granted to the limited extent of amending the last paragraph of this court's opinion to read as follows:

Reversed and remanded for a new trial.

The clerk of the court is directed to incorporate the foregoing change in the original opinion.

In all other respects the motion for reconsideration is denied.

John C. Bryant, Jr.	/s/ H. Lum
Edwin L. Baker	/s/ Yoshimi Hayashi
Deputy Attorneys General	/s/ J. Wakatsuki
on the motion	/s/ Edward H. Nakamura
for Plaintiff-Appellee	/s/ Walter M. Heen

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANT LINCOLN, Defendant-Appellant.

NO. 13771

(CRIM. NO. 5720(1))

MOTION FOR RECONSIDERATION
OF ORDER FILED MARCH 29, 1990

APRIL 6, 1990

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE
HEEN, IN PLACE OF PADGETT, J., RECUSED

Upon consideration of Defendant-Appellant's Motion for Reconsideration of Order Filed March 29, 1990,

IT IS HEREBY ORDERED that the motion is denied. This court declines to reach issues not specifically addressed in this court's opinion as issued on March 8, 1990, and modified on March 29, 1990.

Eric A. Seitz
on the motion
for Defendant-Appellant

/s/ H. Lum
/s/ Yoshimi Hayashi
/s/ J. Wakatsuki
/s/ Edward H. Nakamura
/s/ Walter M. Heen

APPENDIX "D"

NO. 13771

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1989

STATE OF HAWAII, Plaintiff-Appellee, vs. JOHN KALANI LINCOLN, Defendant-Appellant.	CR. NO. 5720(1) APPEAL FROM THE JUDGMENT FILED MARCH 15, 1989, AND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, FILED ON MARCH 30, 1989 SECOND CIRCUIT COURT HON. E. JOHN McCONNELL

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii entered herein on March 8, 1990, as amended, the Judgment, Conviction and Sentence of the Second Circuit Court filed herein on March 15, 1989 is reversed and remanded for a new trial.

DATED: Honolulu, Hawaii, April 6, 1990.

BY THE COURT

/s/ Sandra N. Yasui
CLERK

APPROVED:
/s/ H. Lum
JUSTICE

APPENDIX "E"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. JOHN KALANI LINCOLN, Defendant.	Criminal No. 5720 TRANSCRIPT OF PROCEEDINGS VOLUME XII

TRANSCRIPT OF PROCEEDINGS

before the Honorable E. JOHN McCONNELL, Circuit Court Judge presiding on Thursday, January 26, 1989. Continuation of Jury Trial.

APPEARANCES:

JOHN BRYANT, Esq.
Deputy Attorney General
426 Queen Street
Honolulu, Hawaii 96813
Attorney for the Plaintiff

ERIC SEITZ, Esq.
820 Mililani Street
Suite 714
Honolulu, Hawaii 96813
Attorney for the Defendant

REPORTED BY:

Beth Kelly, RPR, CSR 235
Official Court Reporter
State of Hawaii

[Material Deleted in printing]

(p. 19) THE COURT: Well, the Court's ruling that the witness is unavailable under Rule 804(a)(2) by reason of his refusal to testify, and further that the constitutional requirement as set forth in the United States Supreme Court cases on this subject has been satisfied. At the prior trial, of course, Mr. Seitz you had full opportunity to cross-examine Mr. Kekona. So, I will permit the reading of his prior testimony to the jury.

APPENDIX "F"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, vs. JOHN KALANI LINCOLN, Defendant.	CRIMINAL NO. 5720 AFTERNOON SESSION

(p. 1) TRANSCRIPT OF PROCEEDINGS

before the Honorable E. JOHN MC CONNELL, Circuit Court Judge presiding, at Wailuku, Maui, Hawaii, on Wednesday, February 1, 1989.

APPEARANCES:

John Bryant, Esq.	For the State of Hawaii Deputy Attorney General
Dwight Nadamoto, Esq.	For the State of Hawaii Deputy Attorney General
Eric Seitz, Esq.	For the Defendant

REPORTED BY

Gloria T. Bediamol, RPR, CSR 262
Official Court Reporter
State of Hawaii

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ANTHONY KEKONA, JR. Prior testimony of a hearing held February 9, 1984 was given by virtue of a transcript.

(p. 3) THE COURT: The record will reflect we're reconvened in chambers. Mr. Bryant and Mr. Seitz are present, and the defendant's presence is waived.

MR. SEITZ: Yes.

THE COURT: We're out of the hearing of the jury. The Court has indicated, when we were in chambers yesterday, that it was inclined to admit the reading of a portion of the transcript of proceedings in the rule 40 proceeding. These proceedings occurred on February 4, 1984.

This evidence is offered by the State and is essentially Mr. Kekona's recantation of his recantation. I think Mr. Seitz made his record the last time we were in chambers, but is there anything to say?

MR. SEITZ: My objection is on two grounds: one is that this is a subsequent statement, which is offered, and there is no such thing as a subsequent statement that can be offered. Secondly, I did not have the opportunity to cross-examine Mr. Kekona at such length as I think would have been appropriate in a trial, because this was a rule 40 proceeding.

And I think therefore there are some issues as to the right of confrontation by allowing it in this proceeding.

THE COURT: The Court's feeling is that it's (p. 4) highly probative as to Mr. Kekona's credibility; and further, that although it is hearsay, it is admissible under the former testimony exception to the hearsay rule and in view of Mr. Kekona's unavailability.

For the record, the parties have gone over the transcript and have agreed that the following portions will be read: page 16 line 1 through page 26 line 22, and then page 39 line 18 through page 47 line 23.

MR. BRYANT: That's correct.

THE COURT: Also I understand the State wants to call one rebuttal witness, that being Lieutenant Danley; is that right?

MR. BRYANT: That's correct.

THE COURT: I ask for a brief offer of proof.

MR. BRYANT: Basically, he is going to deny making statements recounted by attorney James Paul, and he is going to be denying statements that the defendant testified that he met at Thanksgiving 1979. He will deny going passed Lahaina and buying beers for the defendant.

THE COURT: Okay anything else?

MR. SEITZ: No, the other matter we talked about before the reporter came in was whether my Exhibit B would be published to the jury, and I would like to put (p. 5) that on the record if we may.

MR. BRYANT: Well, I think my objection is on the record, and I do object to it.

THE COURT: Well, it is in evidence. I will receive it in evidence and permit it to go in with the others as exhibits.

MR. BRYANT: Can we go off the record?

(Discussion was held off the record.)

(Following proceedings were held in open court.)

THE COURT: Let the record reflect the presence of the jury and the defendant.

Mr. Bryant, your rebuttal case?

MR. BRYANT: Your Honor, the State would call Lieutenant Danley to the stand.

GARY DANLEY

called as a rebuttal witness by the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRYANT:

Q. Lieutenant Danley, good afternoon, could you state your full name?

A. Gary G. Danley.

Q. Do you remember a James Paul, Lieutenant (p. 6) Danley?

A. Yes.

Q. Do you remember talking to him back in 1979?

A. Yes.

Q. Did you ever tell Paul that it made you physically sick that the other people involved in this hit were on the street?

A. No, I did not.

Q. Did you ever tell Paul that this defendant was not completely free of guilt?

A. No, I did not.

Q. Did you ever tell Paul that you hoped that he and Eric Seitz conducted a vigorous defense in this case?

A. No, I did not.

Q. Were you ever shown any transmitters by Paul?

A. No.

Q. Let me direct your attention to Thanksgiving 1979. Do you remember that day?

A. Yes.

Q. Did you ever tell the defendant that there were mountains of evidence against him?

A. No, I did not.

Q. Did you ever tell him that there was a (p. 7) contract out for him?

A. I believe I told Mr. Paul that there was a possiblity that his life was in danger.

Q. Did you ever tell the defendant that there was a contract out for his wife?

A. No, I did not.

Q. Let's switch back to November 8, 1979. This was the trip from Wailuku to Lahaina. Did you ever go passed the Lahaina police station and stop and buy beer for the defendant?

A. No, I did not.

Q. Would you ever do that for a prisoner in custody?

A. Never.

MR. BRYANT: Thank you, I have no further questions.

THE COURT: Any questions, Mr. Seitz?

MR. SEITZ: No questions.

THE COURT: You may step down, Lieutenant Danley.

MR. BRYANT: Your Honor at this time, the State would like to call Anthony Kekona to the stand by virtue of his prior testimony at a hearing on February 9, 1984.

THE COURT: Very well.

(p. 8) THE COURT: I assume that Mr. Nadamoto will be Mr. Kekona again.

MR. BRYANT: Yes, Your Honor.

THE COURT: Again, ladies and gentlemen, portions of prior testimony are to be read to you. You should consider them just as if they were being given live by Mr. Kekona himself.

MR. SEITZ: The record is clear we objected to this.

MR. BRYANT: This is direct examination by Mr. Seitz.

Q. Would you state your name for the record, please?

A. Anthony K. Kekona, Jr.

Q. And Mr. Kekona, you are a State prisoner, is that right?

A. That's right.

Q. Are you the same Anthony Kekona who testified in this courtroom in the criminal trial in 1980 involving John Lincoln?

A. That's right.

Q. Do you know Mr. Lincoln?

A. Yes, sir.

Q. Do you see Mr. Lincoln here?

A. Yes, sir, in the blue there.

(p. 9) Q. Mr. Kekona, I would like to show you what I've had – well, let me show the original, if I may. I'd like to show you a document which was attached to the Petition in this case. I believe it's in the Court's file. And let me ask you if your signature is on that document?

The Court states, all right. Mr. Kekona, I am going to hand to you a document that's entitled "Affidavit of Anthony Kekona, Jr." and at the bottom of the affidavit there is a signature. Can you tell me whether or not that is your signature?

A. That's my signature, sir.

The Court says, thank you.

Questions by Mr. Seitz.

Q. In regard to the signature which the judge has just shown you, at the time that you signed that particular document, did you do so in front of a notary public?

A. Yes, sir.

Q. And did you understand at that time that you signed your name to that particular document, that you were swearing that what was contained in that document was true and correct?

A. Yes.

Q. Mr. Kekona, I have a copy of that particular (p. 10) document, which I'd now like to hand to you, which has been marked as Exhibit 2 as previously been shown to opposing counsel in this case. May I approach the witness?

The Court indicates, all right, Mr. Kekona, I'm handing to you what is simply a copy, photocopy or xerox copy of the affidavit that I showed to you that's contained in the Court's file. I would ask you at this time whether or not that is a true and accurate copy of the original that is in the Court's file. You see that clearly enough?

A. Yes, sir that's right.

The Court, your answer would be yes?

A. Yes.

The Court says, thank you.

Questions by Mr. Seitz.

Q. Mr. Kekona, would you take a look at what the judge has there, which is marked as Exhibit 2. And do you see attached to Exhibit 2, two separate exhibits?

A. Yes.

Q. The first exhibit is a letter, is that correct?

A. That's correct.

Q. Do you recognize that letter?

A. Yes.

(p. 11) Q. Is your signature on that letter?

A. Yes, sir.

Q. Is that a copy, a true copy of the original letter which had your signature on it?

A. Yes, sir.

Q. Did you write that letter?

A. Yes, sir.

Q. And to whom is that letter addressed?

A. It's addressed to you.

Q. And did you address that letter to me?

A. Yes, sir, in Washington, D.C.

Q. Okay. You see a date on that particular letter?

A. October 31, 1982.

Q. Was that approximately a date upon which you addressed that particular letter to me?

A. That's right.

Q. Following – well, let me ask you, did you send that letter?

A. Yes, sir.

Q. Following the time that the letter was sent, did you and I have a meeting?

A. Yes, sir.

Q. Do you recall when that meeting occurred?

A. I forgot the date.

(p. 12) Q. All right, would you look at the second exhibit, which is attached to your affidavit. You recognize that second exhibit?

A. Okay. Yes, sir.

Q. What is that second exhibit?

A. November 6, 1:50.

Q. Okay. Was that when you and I had a meeting?

A. Yes.

Q. And you remember what year that was?

A. Um, 1982.

Q. Do you recognize the second exhibit which is attached to your affidavit, the typed exhibit?

A. Is that the second exhibit you're talking about?

Q. No, not the letter. The next page.

A. Okay.

Q. Yes.

A. Yes, sir.

Q. Have you seen that exhibit before?

A. Yes, sir.

Q. When did you see it?

A. I told you about 'em I seen 'em right now.

Q. But when did you first see that particular exhibit, do you recall?

(p. 13) A. This is the first time I seen this.

Q. Was that typewritten portion, that exhibit which is attached to your affidavit, was that attached to the original affidavit you signed?

A. I don't recall.

Q. Maybe we could show you the original affidavit and see if you remember if that document was attached to the original document which you've already said you signed.

The Court says, all right. Mr. Kekona, I am going to hand you the affidavit that I've already showed you. This is the one that you said –

A. Yeah. Okay. Okay.

THE COURT: I want you to look at the things that are attached to the Court's original affidavit. I'm

showing you Exhibit A, okay. And now I am showing you Exhibit B, which is a typewritten thing, a copy of which you have before you on State's Exhibit 2?

A. Okay.

The Court says, all right. Mr. Seitz.

Q. Was Exhibit B attached to the original affidavit that you signed?

A. That's right, sir.

Q. Do you know what Exhibit B is?

A. My statement.

(p. 14) Q. Okay. It's a transcript of a tape, is that right?

A. That's right.

Q. And do you recall when you met with me, that I had a tape recorder with me?

A. Yes.

Q. And do you recall that I told you that I would tape record the conversation?

A. That's right.

Q. When you signed this particular affidavit, which we've shown you, which has two exhibits attached to it, did you read the exhibits?

A. Yes.

Q. In your affidavit, a copy of which is in front of you, do you see paragraph number 2?

A. Is that the exhibit?

The Court said, what he's referring to is your affidavit.

MR. SEITZ: On the first page?

The Court says, is your affidavit, paragraph number 2.

Mr. Seitz says, okay.

The Court says, okay.

Question by Mr. Seitz, you see that?

A. Yes, sir.

(p. 15) Was that paragraph there when you signed the affidavit on November 16, 1982?

A. That's right.

Q. How about paragraph 3, do you remember paragraph 3 of your affidavit?

A. Yeah that's right.

Q. And what did you say in paragraph 3?

A. That you visited me in Lewisburg, Pennsylvania.

Q. And what else did it say?

A. In 1982, November 6.

Q. What is the last part of the sentence, say in that paragraph.

A. True and correct transcript of the conversations attached to my affidavit as Exhibit B.

Q. And you see paragraph 4 of your affidavit?

A. Yes, sir.

Q. Would you read paragraph 4?

A. I referring that the contents of this Exhibit A and B are true and correct.

Q. And when you wrote that particular paragraph where you signed the affidavit which contained that particular paragraph, did you understand what number 4 meant?

A. Yes, sir.

(p. 16) Q. What did it mean to you?

A. That this is a correct statement made by me.

MR. SEITZ: At this time I'd like to offer into evidence the affidavit and the attachments, which I've presented to Mr. Kekona and he's identified.

Mr. Yamamoto says, no objection, Your Honor.

Mr. Yamamoto says, no objection, Your Honor.

THE COURT: All right. The Court at this time will receive it into evidence, the Petitioner's Exhibit Number 2.

MR. SEITZ: I have no further questions.

This is cross-examinations by Mr. Yamamoto.

Q. Mr. Kekona, why did you send a letter to Mr. Seitz on October 1?

THE COURT: Just a minute. I believe Mr. Kekona has a question.

A. Can I get a glass of water?

The Court says, Dwight, could you get a glass of water for the witness. Thank you.

Mr. Kekona, you ready to proceed?

A. Yes, sir.

THE COURT: All right. Mr. Yamamoto.

Questions resumed by Mr. Yamamoto.

Q. Mr. Kekona why did you send that letter of October 31, 1928 to Mr. Seitz?

(p. 17) A. Because I feeled that was my way to come home, you know, to see my parents.

Q. And you remember what you wrote to Mr. Seitz in that letter?

A. That's right, sir.

Q. Was that you wrote to Mr. Seitz on October 31, 1982, in fact true?

A. No.

Q. That was a lie?

A. Yeah.

Q. Now when Mr. Seitz came to see you on November 6, 1982, and when he had to tape recording and he was playing the tape while you and he were talking, were you telling the truth to Mr. Seitz or were you lying to him?

A. I was lying to him.

Q. What you are saying is that the exhibit that Mr. Seitz showed you, so that when you look at Petitioner's Exhibit 2 in evidence, the letter, which is marked as Exhibit A on the bottom, what was contained in that letter is a lie?

A. Yes, sir.

Q. So when you say that you lied about everything, you were in fact lying?

A. Yeah.

(p. 18) When you had this conversation with Mr. Seitz on November 6, 1982, when you told him that John Lincoln was involved in the murder – murders in Honokowai, that was also not true?

A. Yeah.

Q. What was the purpose of you telling Mr. Seitz these lies?

A. To come home.

Q. And okay, let knee ask you this. When were you shipped to the Mainland?

A. In 1980.

Q. And for two years you had not been back to Hawaii, is that correct?

A. Yes.

Q. When you say that you wanted to come home, was there a reason for you wanting to come home?

A. Come home, see family and see what, you know, my home.

Q. When you signed this affidavit, the first page of the document, which has paragraph number 4, I reaffirm that the contents of Exhibit A and B are true and correct, is that true or false?

A. Well, that's what it says here.

Q. Yeah, but when you signed it, did you know that?

A. That's a lie.

Q. The letter and the affidavit, the transcript of the taped conversations were false?

A. Yeah.

Q. So you lied in the affidavit too?

A. That's right.

Q. Your testimony then, Mr. Kekona, is that at the time of the trial back in 1980, you testified and you testified to the truth, is that correct?

A. That's correct.

Q. And this so-called retraction, this affidavit and the exhibits that are before you now, that's a lie?

A. That's a lie.

Mr. Yamamoto states, he has no further questions.

THE COURT: Mr. Seitz?

He is allowed to cross-examine. One moment please, Your Honor.

Dwight, are you ready?

These are questions by Mr. Seitz.

Q. Mr. Cardoza say that they would do anything for you for coming in here this morning and giving the testimony you've given?

A. No.

(p. 20) Q. Did Mr. Cardoza say that he would do anything to you for lying to this Court in an affidavit?

A. I got three life, two 20's, one 10, one five, just drop 'em in the back.

MR. SEITZ: May I have a minute.

Questions continued by Mr. Seitz.

Q. This Detective Cordeiro who we've been talking about, he's the same Detective Cordeiro who you first made your statement to in this case, in which you incriminated Mr. Lincoln, is that right?

A. That's right.

Q. He just happened to be there at the right time at the right moment, isn't that right?

Mr. Yamamoto objects. Objection, Your Honor, argumentative.

THE COURT: Sustained.

Questions by Mr. Seitz.

Q. Mr. Kekona, in your statement to me, which was tape recorded, in which you earlier said in the affidavit were true, you stated that – I'll read you the question.

"Did you see John on Maui as you testified, did he come over and visit with you one time in April of 1978?"

And the answer you gave was, "He came over but it wasn't for this hit thing." You remember that (p. 21) answer?

A. Yes.

Q. And you remember tell me that Mr. Lincoln came over to Maui to talk to you about some marijuana dealings that you and he had, do you recall that?

A. Yes.

Q. Is it true that you and Mr. Lincoln had some marijuana dealings?

A. No.

Q. You had none?

A. No.

Q. Did you ever have any dealings with Mr. Lincoln about marijuana?

A. No.

Q. Did you ever ask Mr. Lincoln to get you any marijuana?

A. No.

Q. Do you remember testifying under oath in the trial of this case, don't you, Mr. Kekona?

A. Yes.

Q. Do you remember testifying that in response to a question by Mr. Yamamoto, Mr. Lincoln came to visit his

brother at Oahu prison while you were there, and you ran out and asked if he could get you some marijuana?

A. He owed me that.

(p. 22) Q. Do you remember that testimony?

A. That's right. He owed me that. Did you remember that too?

Q. So when you just –

The Court states, all right. I am going to stop both of you at this time. You recall I said at the beginning of this hearing. I expect a question, a pause, time for Mr. Kekona to answer and then the next question.

MR. SEITZ: I'll do my best.

The Court states, all right. Now, start over again. Could you repeat your question again, Mr. Seitz?

Question by Mr. Seitz.

Q. Let me ask you another question, Mr. Kekona. A moment ago I asked you, as you sit there under oath, whether you ever asked Mr. Lincoln to get marijuana for you. And you said no. Do you recall saying that here this morning under oath?

A. You are talking about the airport, right on.

Q. Can we have the question the answer read back.

The Court states, I am not sure what question you are referring to.

MR. SEITZ: The initial question when I asked Mr. Kekona if he had ever asked Mr. Lincoln to get (p. 23) marijuana for him.

THE COURT: All right. I don't think there's any dispute that his answer to that was no.

MR. SEITZ: Okay.

The Court states, you want to ask your next question, please?

Questions by Mr. Seitz.

Q. Did you ever ask Mr. Lincoln to get marijuana for you, Mr. Kekona?

A. Okay. Are you talking about the prison?

Q. Ever.

A. Wait.

THE COURT: I am going to interrupt here. I think it's only fair for the witness if you make it clear the time frame you're talking about. And Mr. Kekona, what Mr. Seitz is saying now, in your whole lifetime. In other words, ever. Didn't matter when, but ever. Did you ask Mr. Lincoln for marijuana or for him to get you some marijuana?

A. In the prison yeah.

THE COURT: Okay. Fair enough. Next question.

Q. And you said he owed that you?

A. Yes, sir.

Q. Why did he owe it to you?

(p. 24) A. Because the contract was 10,000 and I only got paid so much. I still didn't get that much money until today.

Q. Were you and Mr. Lincoln involved in any marijuana deals over here on Maui?

A. No.

Q. You were involved in planting and selling marijuana in April 1978, weren't you?

Mr. Yamamoto objects. Objection, Your Honor, irrelevant.

MR. SEITZ; He testified to it at the criminal trial.

MR. YAMAMOTO: What is the relevance of this with regard to whether this witness is telling the truth now with regard to his incantation?

MR. SEITZ: It's in his affidavit, and I'm questioning him on the contents of his affidavit.

The Court indicates, I am going to allow the question.

Mr. Kekona, do you remember the question?

A. Yes.

THE COURT: Okay,

A. Yeah. I know I had half acre.

Questions by Mr. Seitz.

Q. I believe you testified at the criminal (p. 25) trial you were involved in a hui, isn't that what you said?

A. That's right.

Q. With other people?

A. That's right.

Q. And weren't you involved with John Lincoln selling and distributing some of that marijuana for you?

A. He was not selling nothing for me, and he wasn't working for me. If anything, he owes me.

Q. Wasn't John Lincoln selling and distributing marijuana for you that you grew in Maui in April of 1978?

A. I had my own hui to sell my own.

Q. and was John –

A. So why do I need John Lincoln?

Q. What was your relationship with John Lincoln in April of 1978?

A. For a contract hit.

Q. That's the only relation you had with him?

A. That's the only relation.

Q. Did you talk with Mr. Lincoln on March of 1978?

Mr. Yamamoto objects. I'm going to object to that as being irrelevant.

THE COURT: Mr. Seitz?

Mr. Seitz says, yes I am going to show that (p. 26) there was an ongoing relationship from the time that Mr. Kekona was released from from Habilitat, with Mr. Lincoln well before any event having to do with this particular hit. Contrast to what he's just testified, that that was the only relationship he had with Mr. Lincoln.

THE COURT: I'll allow the question, Mr. Kekona. You want him to repeat it?

A. Yeah.

The Court says, Mr. Seitz, would you repeat your question?

Q. Were there any telephone conversations between yourself and Mr. Lincoln in March of 1978?

A. In March, I think I was in Honolulu with him.

Q. That's right.

A. And the only contact through the phones I had was in April.

Q. Did you see Mr. Lincoln in March of 1978?

A. Yeah, I was right in the same car and in the same house.

Q. He was helping you get jobs, wasn't he?

A. Supposedly.

Q. And then you came back to Maui in April of 1978, is that correct?

A. That's right.

(p. 27) Q. And didn't you stay in touch with Mr. Lincoln?

A. No.

Q. You didn't have any contact with him until he called you about this hit?

A. That's right.

Q. Was anybody else involved in these offenses, these killings that occurred, besides you and Patrick Hawkins?

MR. YAMAMOTO: Objection, Your Honor, irrelevant.

THE COURT: I feel now we're getting to areas of irrelevance for purposes of this hearing, Mr. Seitz. You're going to have to make another offer of proof to show the relevance.

MR. SEITZ: Well, again, I'm examining him on page B4 of the exhibit attached to his affidavit, and on the statements which he now claims are not true.

THE COURT: All right. I'll allow that question, Mr. Kekona. You remember the question?

A. No.

THE COURT: Mr. Seitz, would you repeat it, please?

Question by Mr. Seitz.

Q. Was anybody else involved in these crimes, (p. 28) these shootings for which you were convicted, other than you and Patrick Hawkins?

A. John Lincoln.

Q. Was anybody else involved?

A. No.

Q. Did you go to the apartment of Mr. Warford, Mr. Blue, and Miss Savage to rob them?

A. To make them look like a robbery, but was one contract hit.

Q. You were going to kill them, there was no question in your mine?

A. That was the job set up for me, to kill them.

Q. Was that what you went there to do?

A. That's right, and I did that.

Q. That's what both you and Patrick Hawkins were there for?

A. That's right.

Mr. Seitz says, I have no further question.

That concludes the reading.

[Material Deleted In Printing]

(Following proceedings were held in open court.)

THE COURT: Ladies and gentlemen, we have completed the evidentiary phase in this case. The Court has a lot of matters that have been piling up because of the length of this trial, which were set for tomorrow and Friday. And also, both attorneys and the Court have quite a bit of homework to do in preparing the instructions, which will be given to you.

So because we have a couple of days of extra work, we're going to recess the trial until Monday morning at 8:30. At that time, you will hear the final arguments of both sides and receive the Court's instructions.

I want you, despite the fact that you have heard the evidence, to keep an open mind until you have (p. 38)

been instructed in the law that is applicable to this case. It is very important between now and Monday morning that you not discuss the case with anyone nor permit anyone to discuss it with you. If anyone attempts to discuss it with you, you should refuse and report that to me. You should not go to any of the places mentioned by the evidence, you should not read or listen to any media account of this case.

As you know, the reasons for all of this is that your decision must be based strictly on the evidence that's been received in this room and on the Court's instructions. Expect Monday morning, when you get here at 8:30, that both sides will proceed with their final arguments.

The Court will then instruct you and the law applicable to this case, and you should be into your deliberation sometime during the middle of the day on Monday.

Is there anything else?

MR. BRYANT: Nothing by the State.

THE COURT: I would like to see counsel after this, and I will see the jurors on Monday morning at 8:30.

(Court was adjourned until Monday, February 6, 1989 at 8:30 a.m.)

(p. 39) STATE OF HAW.)
)
COUNTY OF MAUI)

I, GLORIA T. BEDIAMOL, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 39 inclusive comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 5th day of May, 1989.

/s/ Gloria T. Bediamol
GLORIA T. BEDIAMOL, RPR,
CSR #262
Official Court Reporter

APPENDIX "G"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

JOHN K. LINCOLN, Petitioner vs. STATE OF HAWAII, Respondent.	)	Criminal No. 5720 AFFIDAVIT OF ANTHONY K. KEKONA, JR.: EXHIBITS A AND B

AFFIDAVIT OF ANTHONY K. KEKONA, JR.

BOROUGH OF LEWISBURG STATE OF PENNSYLVANIA	)	SS.

ANTHONY K. KEKONA, JR., being first duly sworn on Oath, deposes and says:

(1) I presently am confined in the United States Penitentiary, Lewisburg, Pennsylvania.

(2) On October 31, 1982, I sent a letter to Attorney ERIC A. SEITZ, a true copy of which is attached to my affidavit as Exhibit A.

(3) On November 6, 1982, Mr. SEITZ visited me at the U.S. Penitentiary, Lewisburg, Pennsylvania, and our conversation was tape recorded. A true and correct transcript of the conversation is attached to my affidavit as Exhibit B.

(4) I reaffirm that the contents of Exhibits A and B are true and correct.

/s/ Anthony K. Kekona, Jr.
ANTHONY K. KEKONA, JR.

Subscribed and sworn to before me
this 16th day of November, 1982.

/s/ Illegible
Notary Public

EXHIBIT A

Anthony Kekona N002-08
P.O. Box. 1000
Lewisburg, Pennsylvania
17837

Oct. 31, 1982.

Attorney At Law
Mr. Eric Sietz
Washington D.C. 20012

Dear Sir,

I'm writing to let you know that I want Mr. John K. Lincoln released from Prison. I tried writing to you in Hawaii and calling you.

Now I tried about everything and I know about Perjury and I don't care.

Please respond to my letter as soon as possible and let me know what I can do to help.

If you want to, I'll see you in Person here at Lewisburg. Now Please Stamp confidential on the Mail when you write. Thank you for your time.

Yours truly,
Anthony K. Kekona Jr.

TRANSCRIPT

ERIC A. SEITZ [ES]

ANTHONY K. KEKONA, JR. [AK]

ES: Tony, today is Saturday afternoon, November 6th, and it's about 1:50 in the afternoon, and I'm here – just you and I – we're in a booth in the visiting room at Lewisburg Prison, and I'm here because I got a letter from you, right?

AK: Right.

ES: Let me just show you the letter. The letter was dated October 31st, and it's addressed to me. Is that the letter that you wrote to me?

AK: That's right.

ES: OK, and that's your signature on it?

AK: Yeah.

ES: OK. Now, did I or anybody else talk to you about writing this letter?

AK: No.

ES: When's the last time you and I had any communications, do you recall?

AK: '78 or '79.

ES: Well, the trial was in 1980, when you testified. Have you seen me since then?

AK: No.

ES: We haven't had any communications since then.

AK: No.

ES: Now, when you wrote this letter, had anybody talked to you about writing this letter for him?

AK: No.

ES: Did anybody threaten you or anything?

AK: No.

AK: No.

ES: Why did you write it?

AK: Because I feel that an innocent man is in jail, and, uh, because of my statement, I went put him away, and I don't feel it's right; that, the man didn't hire me, you know? John K. Lincoln, you know? And I don't feel it's right that what I did, and I want the man out of jail.

ES: Well, why did you say in your statements to the police and then in testimony at trial that John had hired you?

AK: Because he made me mad. Because he didn't want to help me. And things like that. I feel, you know, he just never like try to help me so, so I try to cross him too. And he was never involved in this, this thing you know.

ES: Well, after this incident happened, when you went to Honolulu, did you see John Lincoln then when you were running?

AK: Yes.

ES: Did you think at that time that John might have set you up to be captured by the police?

AK: That's what I feel inside my heart, yeah.

ES: And why do you feel he might have done that?

AK: Just because, only him knew where I was, and he could have been my friend and turned me in, you know?

ES: Well, let me ask you this. You said he had nothing to do with this incident at all.

AK: No.

ES: Did you have some phone conversations before it happened?

AK: Yes.

ES: Did you see John on Maui as you testified; did he come over and visit with you one time in April of 1978?

AK: He came over but it wasn't for this hit thing.

ES: What was it for? Can you tell me?

AK: He just came over to see if I had some marijuana like that.

ES: And was that what the phone conversations were about?

AK: Yes.

ES: Now, you know that if you take back or change your testimony at this point in time you're going to have to testify? Do you understand that? Do you want to testify?

AK: Yeah, I want him out of jail. I want to testify, in my behalf and his behalf.

ES: Are you doing this because this will get you an opportunity to testify in Hawaii or are you doing it because you believe what you're saying now?

AK: I believe what I'm saying.

ES: And nobody's threatened you or anything?

AK: No.

ES: Now, are you prepared to tell the court what did happen?

AK: Yes.

ES: Are you able to tell me now what did happen if it didn't involve John Lincoln?

AK: Yes.

ES: Well, why don't you tell me as much as you feel comfortable telling me. What actually did happen in connection with these shootings?

AK: Well, I went over to rob the people, you know, and to get what I wanted I killed them and uh, I wanted the dope they had and the money. They had money with them and I set it up where to look like John did it, you know, like John went hire me and I got mad 'cause he never come through with this marijuana deal and he had uh, he wasn't involved in none of this hit that I

ES: Well, you testified that John Lincoln gave you some pictures.

AK: Right.

ES: Remember that?

AK: Right.

ES: And he drew you a diagram of some kind.

AK: Right.

ES: Remember that?

AK: Right.

ES: Did that happen?

AK: No.

ES: Did somebody else give you some pictures?

AK: Not really.

ES: Well, are you prepared to tell me, were there any pictures involved?

AK: No.

ES: Did somebody else hire you?

AK: No.

ES: Was anybody else involved in this other than you and Hawkins?

AK: Just me and Hawkins.

ES: Now Hawkins said he thought that there was somebody else involved who hired you. Why would he have said that?

AK: Because of what I told him.

ES: When did you tell him something?

AK: Well, then I was preparing to rob these people.

ES: Do you remember what you told him?

AK: Yeah, that I was going rob these people and he was interested in helping me, so he got me a gun and we used his jeep.

ES: Because you said you think he wasn't involved, is that the only reason?

AK: I not thinking that he's not involved. He's not involved at all.

ES: And is that the only reason you want him out of jail?

AK: Yeah. Because I lied and I no feel good inside for lying like that.

ES: And you also know that what you're telling me now is that essentially you committed perjury?

AK: That's right.

ES: You understand that?

AK: Right.

ES: And you wrote in your letter you said you really don't care about that, you want to set it right?

AK: Right.

ES: Is that the way you feel today?

AK: That's right.

ORIGINAL

90-20

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

STATE OF HAWAII, Petitioner

v.

JOHN KALANI LINCOLN, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC A. SEITZ
ATTORNEY AT LAW
A LAW CORPORATION

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Telephone: (808) 533-7434

Attorney for Respondent

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TABLE OF AUTHORITIES

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

STATE OF HAWAII, Petitioner

v.

JOHN KALANI LINCOLN, Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondent John Kalani Lincoln hereby opposes the petition for writ of certiorari filed herein and respectfully submits that the petition should be denied.

Jurisdiction

For the reasons stated herein Respondent submits that this Court does not have jurisdiction to review and disturb the judgment of a state court which was predicated upon adequate and substantial state grounds, and in deference to the proper authority of the Supreme Court of the State of Hawaii the petition for writ of certiorari herein should be denied.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 14 of the Constitution of the State of Hawaii provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against the accused . . .

Rule 802, Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes, provides that

> Hearsay rule. Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Hawaii supreme court, or by statute.

Rule 804(b)(1) and (6), Hawaii Rules of Evidence, Chapter 626, Hawaii Revised Statutes, provide that

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or an-

other proceeding, at the instance of or against a party with opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence . . .

Statement of the Case

On May 4, 1978, Anthony Kekona, Jr., and Patrick Hawkins went to the Kaleialoha Condominium in Honokowai, Maui. Upon entering apartment 404 Kekona brandished a handgun and demanded drugs and money. When only small amounts of cash and marijuana were produced, Kekona demanded more. At that point Paul Warford said "this has gone far enough" and made a move toward Kekona. Kekona shot Warford and then, in rapid succession, shot and killed David Blue and seriously wounded Harriet Savage.

Patrick Hawkins was apprehended a short distance away and was returned to the Kaleialoha Condominium where

Harriet Savage saw and identified him. After making several written and oral statements to the police in which he denied any intention or plan to harm the victims, Hawkins named Anthony Kekona as the gunman.

Kekona was arrested several days later in Honolulu as he was preparing to flee to the mainland. One year later, on July 30, 1979, Kekona plead guilty and was sentenced for the murders of Paul Warford and David Blue and the attempted murder of Harriet Savage. At his sentencing Kekona described the incident as a robbery that went "haywire" and gave no indication that persons other than himself and Hawkins were involved in the crimes.

Within hours after his sentencing, however, Kekona made a lengthy tape-recorded statement for his uncle, Maui police detective Robert "Ace" Cordero, in which, for the first time, Kekona claimed that he had been hired by John Kalani Lincoln to kill Warford, Blue, and Savage. Kekona told Cordero that the contract price was $10,000.00, that Lincoln promised to provide a lawyer and take care of any witnesses if Kekona were caught, and that Kekona would receive subsequent jobs -- "the hits on Maui".

Based upon Kekona's "new information," Maui County authorities reopened their investigation and launched a massive effort to implicate Lincoln and other unnamed parties in whose behalf Mr. Lincoln was believed to have

acted. More than forty persons -- police, deputy prosecutors, and other persons -- were pulled into the case, and the county incurred extraordinary expenses in a relatively short period of time. Based upon sworn testimony of Kekona and Maui detective Gary Danley the authorities sought and obtained a wiretap upon Mr. Lincoln's home telephone after falsely telling a state court judge that the tap was essential because there were no other suspects and no other viable means to conduct their investigation.

Although John Lincoln was not the primary object, or even the target, of the wiretap, his telephone conversations were overheard and taped for a period of several days, including discussions with his wife and his attorney.

On August 23, 1979, while the tap was in place, Maui authorities falsely announced the escape of Anthony Kekona, who then proceeded to call Mr. Lincoln's home and issue threats to him and his wife. At the direction and under the supervision of Maui police and prosecutors Kekona unsuccessfully tried to elicit incriminating statements from Mr. Lincoln and to induce evidence of other persons who allegedly were responsible for the Honokowai crimes. Mr. Lincoln notified Honolulu police about the telephone calls and attempted to arrange a meeting with Kekona at which the Honolulu plice could recapture him, but, of course, Kekona did not appear.

On September 6, 1979, while he was still supposedly at large, Kekona appeared and testified before a grand jury concerning his allegations against Mr. Lincoln. Then after it was announced that Kekona had been "apprehended," another grand jury returned and falsely swore to "a true bill" indicting Kekona for escape. A circuit court judge approved of the grand jury's participation in the indictment scheme even through the procedure severely compromised the entire grand jury process.

Eventually on October 24, 1979, Mr. Lincoln was indicted upon two counts of "murder for hire" and a third count of attempted "murder for hire." He surrendered himself to the police voluntarily and was held without bail.

Mr. Lincoln's counsel moved to quash and/or dismiss the indictment objecting, inter alia, to the murder "for hire" language and arguing that the actual offense was murder. The prosecutor conceded that although there is no offense of "murder for hire" in Hawaii the objectionable language was "mere surplusage and will not vitiate the indictment." However, the prosecution requested -- and the jury was given -- instructions as to both "murder for hire" and the so-called "lesser included offense of murder," and the jury acquitted Mr. Lincoln of the charges that he had hired Kekona to kill Paul Warford and David Blue. The jury convicted him of the two "lesser included" counts of "mur-

der" and of the attempted murder of Harriet Savage.

The court sentenced Mr. Lincoln to concurrent terms of life imprisonment with parole and twenty years, and the judgment was affirmed on appeal. State v. Lincoln, 3 Haw. App. 107, cert. denied 64 Haw. 689 (1982).

In late 1982, Anthony Kekona submitted an unsolicited sworn affidavit in which he recanted his trial testimony and reasserted that only he and Hawkins had been involved in the crimes. Kekona stated that John Lincoln had no connection with the shootings and that his only contacts with Mr. Lincoln involved marijuana transactions in which they collaborated. Eventually a hearing was held upon Mr. Lincoln's motion for a new trial, but at that time Kekona recanted his recantation, claiming he only wanted a free trip back to Hawaii to see his family.

In January, 1987, the United States Court of Appeals ruled that there were four potential grounds for setting aside Mr. Lincoln's convictions and directed the District Court to conduct further hearings to determine whether a new trial was required. Lincoln v. Sunn, 807 F.2d 805 (9th Cir. 1987). Following a hearing on just the first of those four issues, the Honorable Samuel P. King, United States District Judge, held that the prosecutor had commented impermissibly upon Mr. Lincoln's failure to testify in his own defense. Judge King thereupon issued a

Decision and Order on August 17, 1987, directing that Mr. Lincoln be retried or set free within 120 days. Lincoln v. Sunn, 674 F. Supp 788 (D.Hi. 1987).

The retrial commenced on January 17, 1989. Despite the previous acquittals of "murder for hire," the prosecutor repeatedly told the jury that the sole issue was whether Lincoln had "hired" Kekona to shoot the three victims.

Kekona was called as a prosecution witness and refused to testify. Patrick Hawkins did not appear. Over strenuous objections by the defense, the prosecutor was permitted to read Kekona's and Hawkins' 1980 testimony to the jury.

In his closing argument the prosecutor strenuously attacked Kekona -- his own witness -- referring to him as "not fit to be called a human being" and "a man completely without morals." The prosecutor then told the jury "you should not totally disregard Kekona's statements because of the type of person he is."

After first announcing that it was hopelessly deadlocked, the jury continued to deliberate. After several days the jury returned verdicts acquitting Mr. Lincoln of the murder of David Blue and the attempted murder of Harriet Savage, and convicting him of the murder of Paul Warford. That conviction was set aside by the Hawaii Supreme Court on

the ground that Kekona's prior unreliable testimony was admitted erroneously without any opportunity for cross-examination before the triers of fact. Without the critical testimony of Kekona the Hawaii Supreme Court said, "[t]he evidence against Lincoln is flimsy."

A third trial has been scheduled for October 8, 1990, at which time the prosecution plans to call Anthony Kekona as its star witness. For this occasion the state has concluded "an understanding" with Kekona, as evidenced by the affidavit and letter attached hereto as Appendices A and B.

Reasons for Denying the Writ

The judgment of the Hawaii Supreme Court is based upon independent and sufficient state grounds and is consistent with that Court's previous interpretations of applicable state constitutional and statutory provisions. The decision below also is consistent with and implements this Court's decisions in Ohio v. Roberts, 448 U.S. 56 (1980), and Chambers v. Mississippi, 410 U.S. 284 (1973), inter alia.

A. The Judgment Below Rests Upon Independent and Sufficient State Grounds.

In its decision below the Hawaii Supreme Court did nothing more than reiterate the truism that exceptions to the state's hearsay rule shall not be applied blindly

when the proffered hearsay evidence is unreliable. Citing to its own decisions in which the reliability of the earlier testimony was not at issue, the Hawaii Supreme Court held simply that in state criminal trials a defendant's right to confront critical witnesses may not be compromised by the use of previous testimony that is or was unreliable.

In the instant case Kekona's 1980 testimony was riddled with inconsistencies and directly contrary to his earlier statements in and out of court. Kekona himself lost track of the number of times he lied in these proceedings. Mr. Lincoln's acquittal of "murder for hire" suggests that the first jury rejected a substantial portion of Kekona's testimony.

Then in 1982 Kekona recanted his testimony under oath, stating that Respondent Lincoln was not involved in the shooting of Paul Warford, David Blue, and Harriet Savage. And in 1984 Kekona recanted his recantation -- again under oath.

In short, Kekona has demonstrated clearly that he is "not fit to be called a human being" and is "a man completely without morals," as the prosecutor so aptly described him. Under no definition of the term can Kekona's prior testimony be characterized as "reliable." By rejecting its use at the second trial, without confrontation before the triers of fact, the Hawaii Supreme Court sought

only to establish a sufficient level of trustworthiness for the admissibility of hearsay evidence to insure the fairness of criminal trials in the courts of the State of Hawaii.

B. The Hawaii Supreme Court's Reading of this Court's Decisions Was Appropriate and Correct

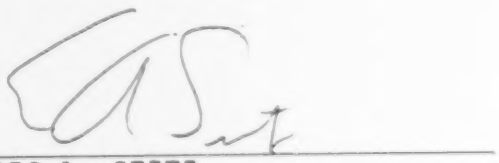
In Chambers v. Mississippi, 410 U.S. 284, 298 (1973), this Court criticized the mechanistic application of the rules of evidence and counselled an approach "based upon experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." And in Ohio v. Roberts, supra, the Court held that the right to confrontation may be curtailed in circumstances where "the ultimate integrity of the fact-finding process" is not compromised, but warned that evidence which is admitted without confrontation must be "marked" with "particularized guarantees of trustworthiness." Ohio v. Roberts, supra, at 65-66.

In its reliance upon Chambers v. Mississippi, supra, and Ohio v. Roberts, supra, the Hawaii Supreme Court rejected the use of patently untrustworthy evidence which had been admitted by the trial court without any consideration for its reliability. Since Kekona's prior testimony may, indeed, have tipped the scales in an otherwise "flimsy" case, the Hawaii Supreme Court held correctly that its use severely compromised the integrity of the trial

court's fact-finding process. Because the opinion below is entirely consistent with all of the relevant decisions of this Court it is submitted that the instant petition for writ of certiorari is groundless and should be denied.

Conclusion

For all of the reasons stated above, the Court should deny the petition for writ of certiorari.



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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	)	CR. NO. 5720(1)
	)	
vs.	)	COUNT IV: MURDER
	)	
JOHN KALANI LINCOLN,	)	AFFIDAVIT OF ANTHONY KEKONA, JR.
	)	
Defendant.	)	
	)	

AFFIDAVIT OF ANTHONY KEKONA, JR.

STATE OF INDIANA)
) SS.
_____ COUNTY)

ANTHONY KEKONA, JR., being first duly sworn upon oath, hereby deposes and says:

1. That I am currently an inmate at the United Federal Penitentiary at Terre Haute, Indiana, serving a sentence of life imprisonment with the possiblity of parole for what I did on May 4, 1978;

2. That on May 4, 1978, I shot and killed Paul Warford and David Blue. On that date I also shot Harriet Savage in the head;

3. That in July 1979, I pled guilty to two counts of murder, and one count of attempted murder for what I did on May 4, 1978;

4. That prior to May 4, 1978, John Kalani Lincoln gave me money and told me to shoot Paul Warford, David Blue and Harriet Savage;

5. That I hereby promise that I will testify in Lincoln's upcoming retrial, and will tell the truth to the jury as to the facts about how Lincoln hired me to shoot Paul Warford, David Blue and Harriet Savage, and also to what happened after the shootings between Lincoln and myself;

6. That I will not invoke my Fifth Amendment right against self-incrimination on any matter that the Judge says I must testify to; and

Further Affiant sayeth naught.

Anthony Kekona Jr.
ANTHONY KEKONA, JR.

State of Indiana
County of Vigo

Subscribed and sworn to before me
this 23rd day of May, 1990.

Beverly K. Mackin
Notary Public, State of Indiana

My commission expires: 12-01-93

Resident of Vigo County

WAIHEE
VERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 548-4740
FAX (808) 548-1900

May 23, 1990

HAND DELIVERY

Anthony Kekona, Jr.
Inmate
U.S. Penitentiary
Terre Haute, Indiana 47808

Re: State v. John Kalani Lincoln,
Cr. No. 5720(1); Count IV: Murder

Dear Mr. Kekona:

Due to the Supreme Court of Hawaii's reversal of Lincoln's conviction for the murder of Paul Warford, we must retry Lincoln.

In exchange for your truthful testimony regarding Lincoln's hiring of you to "hit" Paul Warford, we are willing to make arrangements for you to be housed in Hawaii for the duration of your sentence.

You would be housed initially in Halawa High Security Facility. Pending good behavior and in the normal course, you would eventually be transferred to less secure facilities, such as Halawa Medium Security Facility, Oahu Community Correctional Center, or otherwise as determined by the Department of Corrections.

The Department of the Attorney General will not agree to "cut" your prison sentence, nor will we agree to an early parole date. Your cooperation in terms of truthful testimony, will, however, be brought to the attention of the Hawaii Paroling Authority since they have, in fact, the ultimate responsibility to determine your release or parole date.

In summary, you will be initially housed at the Halawa High Security Facility in exchange for your truthful testimony at the trial against John Kalani Lincoln. Your continued stay in Hawaii will depend on the truthfulness of your testimony and your own good behavior. Should we get any indication that you are not testifying truthfully, or that you are involved in any misconduct, you are subject to be returned to your original place of incarceration.

You should also understand that there will be no other negotiations to reach an agreement for your truthful testimony. All terms of any agreement which we are willing to offer are in this letter. There will be no other terms.

Very truly yours,

John C. Bryant, Jr.

John C. Bryant, Jr.
Deputy Attorney General
Criminal Justice Division

JCB:md
1689K

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that one copy of the within was duly served this date by hand-delivery upon the following at the address listed below:

JOHN C. BRYANT, ESQ.
STEVEN S. MICHAELS, ESQ.
Deputy Attorneys General
State of Hawaii
Room 214, Hale Auhau
425 Queen Street
Honolulu, Hawaii 96813

DATED: Honolulu, Hawaii, July 25, 1990.

ERIC A. SEITZ

(2)

No. 90-20

In The

Supreme Court of the United States

October Term, 1990

STATE OF HAWAII,

Petitioner,

v.

JOHN KALANI LINCOLN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITIONER'S REPLY MEMORANDUM

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State of Hawaii
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No. 90-20

In The

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STATE OF HAWAII,

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v.

JOHN KALANI LINCOLN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITIONER'S REPLY MEMORANDUM

I. SUMMARY OF ARGUMENT.

Respondent John Kalani Lincoln's Brief in Opposition demonstrates clearly why this Court has jurisdiction to overturn the Supreme Court of Hawaii's judgment reversing, on Confrontation Clause grounds, Lincoln's conviction for murder, and, in addition, why that judgment sharply departs from this Court's jurisprudence, and, in turn, merits review and reversal.

In addition, as the judgment below conflicts with *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), the Court may wish to grant the petition, vacate the judgment, and

remand for further consideration in light of the decision in *Idaho v. Wright*.

In any event, the petition should be granted to correct the Supreme Court of Hawaii's clear departure from the settled rule that the Confrontation Clause is not violated by admission of "cross-examined prior-trial testimony," which has been repeatedly held to fall within a "firmly rooted hearsay exception." *Ohio v. Roberts*, 448 U.S. 45, 66 & n.8 (1980).

II. ARGUMENT.

A. The Judgment Does Not Rest Upon an Independent and Adequate State Ground.

Respondent's argument that "[t]he judgment of the Hawaii Supreme Court is based upon independent and sufficient state grounds" (Resp. Br. 9) simply ignores the now-settled requirement, dictated by *Michigan v. Long*, 463 U.S. 1032 (1983) (per curiam), and a host of decisions since, that this Court will assume jurisdiction over final judgments arising from the state courts in the absence of "a 'plain statement' of the [state] court's reliance on an alternative state-law holding." *Quinn v. Millsap*, 109 S. Ct. 2324, 2329 n.6 (1989). Indeed, *Long* is not even cited, let alone discussed, in the opposition brief.

Respondent simply has no good answer to the fact that, as in *Long* itself, the Supreme Court of Hawaii's references to state law, in the course of holding that the admission of Anthony Kekona Jr.'s past cross-examined testimony "violate[d] Lincoln's constitutional right to confront his accuser" (Pet. App. 9a), were "interwoven

with" "federal law" and failed to indicate the state court's understanding that its result was not in any way "compelled by" federal law. *See Long*, 463 U.S. at 1040. Indeed, Respondent aptly notes that the Supreme Court of Hawaii's analysis was grounded fundamentally in the state court's "[r]eliance upon *Chambers v. Mississippi*, [410 U.S. 284 (1973)] and *Ohio v. Roberts, supra*" (Resp. Br. at 11).

Lincoln's claim that this Court's authority is ousted because the Supreme Court of Hawaii also relied upon "its own decisions" does not satisfy *Long's* plain statement requirement, and in fact is contrary to 175 years of precedent authorizing the correction of state court error in this Court. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

As has been repeatedly held, state courts fully share authority to enforce federal law. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985); *Illinois v. Gates*, 462 U.S. 213, 221-22 (1983); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982); *Allen v. McCurry*, 449 U.S. 90, 105 (1980).

With that authority comes reviewability in this Court of constructions of federal law that underlie a final judgment, as exists in the case here, which is not accompanied by a "plain statement" of reliance on state law grounds. As stated in our Petition, nothing in the Supreme Court of Hawaii's "own decisions" which were cited in support of the judgment below (*State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974), and *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697

(1973); *see also State v. White*, 65 Haw. 286, 651 P.2d 470 (1982)), in any way indicate that the Hawaii confrontation clause (Haw. Const. art. I, § 14 (1978)) is viewed as broader than its federal counterpart, and, at the least, the judgment below signifies that the Hawaii Constitution "is construed in pari materia with the [Sixth] Amendment." *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987).

Respondent simply has no answer to this, and the independent and adequate state ground doctrine is no bar.[1]

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[1] Respondent makes no argument (and thus should be deemed to have waived (*see* Rule 15.1) any claim) that the grounds for reversal were not "pressed or passed upon" below, *see Illinois v. Gates*, 462 U.S. 213, 218-22 (1983), and it is clear that the judgment below is final. *See* Pet. at 2 (citing *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984). Indeed, the necessity for review has become even more salient since the petition (and even the brief in opposition) were filed, insofar as the absent witness here, Anthony Kekona, Jr., has recently stated an intention to refuse to cooperate unless the State provides an array of benefits, including an early release date, which the Attorney General of Hawaii quite properly believes at this time, if granted, would lead to a miscarriage of justice. In light of this development, the state trial court to which the case has been remanded has suggested it will dismiss the indictment. A transcript of the state court's oral remarks at the hearing on Respondent's recent motion to dismiss is attached and called to the Court's attention pursuant to Rule 15.7. Also attached pursuant to Rule 15.7 is Petitioner's Motion for Further Hearing on Defendant's Renewed Motion for Judgment of Acquittal and/or Dismissal of Amended Indictment, No. 90-1022 (Haw. Cir. filed Sept. 11, 1990). Without in any way conceding the propriety of any dismissal order under the mandate of the Supreme Court of Hawaii, or otherwise, or diminishing the State's efforts to satisfy the state courts, Petitioner submits

(Continued on following page)

B. Review Should be Granted to Correct the Supreme Court of Hawaii's Expansive Reading of the Reliability Component of this Court's Confrontation Clause Jurisprudence.

Respondent offers no good ground for denying review of our central claim that the Supreme Court of Hawaii's reversal of Respondent's conviction fundamentally misapplied this Court's settled precedents construing the Confrontation Clause. *See* Pet. at 11-15. Indeed, as this Court's analysis in *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), virtually dictates reversal of the judgment of the Supreme Court of Hawaii, the grounds for granting a writ of certiorari are plain.[2]

As our Petition makes clear, the reversal of Respondent's conviction on the ground that "the prior cross-examination of Kekona" was "rendered inadequate by subsequent events" (including Kekona's own recalcitrance at Respondent's second trial) wrongly "imposes the burden of 'undertak[ing] a particularized search for "indicia of reliability" ' in precisely those cases in which such searches have been ruled unnecessary." Pet. at 13 (quoting *Roberts*, 448 U.S. at 66, 72). As *Idaho v. Wright*, 110 S. Ct. 3139 (1990) shows, the Supreme Court of

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(Continued from previous page)

that, despite Respondent's efforts to narrow the import of the judgment below (*see* Resp. Br. at 9), these new facts underscore the finality of the judgment below and considerations warranting certiorari.

[2] *Idaho v. Wright* was decided on the day the petition for certiorari in this case was filed, and, therefore, was not cited in the Petition. However, the grounds for reversal to which *Wright* pertains were fully raised in the petition.

Hawaii's inquiry into the "reliability" of Kekona's past cross-examined trial testimony based upon "subsequent events" is simply wrong.

As *Wright* reiterates, under this Court's "general approach" to confrontation problems, "once a witness is shown to be unavailable," his out-of-court statements may be introduced where the statement bears " 'adequate "indicia of reliability," ' " and such reliability " 'can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.' " 110 S. Ct. at 3146. In clarifying this "safe harbor" for evidence within such "firmly rooted" exceptions, the Court reasoned that "[a]dmission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Id.* at 3147.

Wright thus makes clear the distinction in analysis for admission under the exception for past cross-examined trial testimony (which applied to both Kekona's 1980 trial testimony (*see* Pet. App. 15a) and his 1984 testimony retracting his 1982 retraction (*see* Pet. App. 18a)), and admission under a "residual hearsay exception," which, "by contrast, accommodates *ad hoc* instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible.' " *Id.* As *Wright* makes clear, it is only the latter category of hearsay statements that must be supported by " 'a showing of particularized guarantees of trustworthiness.' " *Id.* at 3148. In analyzing why the "firmly rooted hearsay exceptions" receive this distinct favorable treatment, the Court emphasized that

" '[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight.' " *Id.* at 3149 (citation omitted).

The judgment of the Supreme Court of Hawaii cannot be squared with this logic, or the decisions in which it rests, and must be reversed. While never contesting that Kekona's past cross-examined trial testimony fell within a "firmly rooted" hearsay exception, the Supreme Court of Hawaii ignored the "the weight accorded longstanding judicial and legislative experience" with the exception for such testimony, and, what is more, sought to review the wisdom of applying that exception through the lens of hindsight, as focused by Kekona's feigned retraction of his 1980 trial testimony. Such an approach, under *Wright*, is erroneous even if the exception for past cross-examined trial testimony were *not* "firmly rooted," which, of course, is plainly not the case, as nearly a century of precedent indicates. *See, e.g., Mattox v. United States*, 156 U.S. 237 (1895). As *Wright* makes clear, the "indicia of reliability" component of this Court's alternative basis for gaining admission of otherwise admissible hearsay must turn on "whether the . . . declarant was particularly likely to be telling the truth when the statement was made," *Wright*, 110 S. Ct. at 3150. Evidence that subsequent events give rise to grounds for impeachment is simply not relevant to this inquiry, and, a fortiori is irrelevant when, as *is* the case here, the proffered testimony does fall in a "firmly rooted" hearsay exception. *See also* id. at 3150-51.

Respondent's tautological claim that the Supreme Court of Hawaii properly rejected Kekona's former trial testimony as "patently untrustworthy evidence which had been admitted by the trial court without any consideration for its reliability" (Resp. Br. 11) simply overlooks "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Wright*, 110 S. Ct. at 3147. Indeed, Respondent's conclusory arguments that the 1980 Kekona prior trial testimony is "patently untrustworthy" (Resp. Br. 11), confirms that, under the rule adopted by the Supreme Court of Hawaii in this case, in any situation where a witness becomes recalcitrant at trial, past cross-examined testimony, no matter how scrupulously cross-examined, would be constitutionally inadmissible. As the Petition shows, this is not, nor can it be, the law.[3]

The short answer to Respondent's arguments is that the balance struck by the Confrontation Clause, *see Bourjaily v. United States*, 483 U.S. 171, 182 (1987), in this case, and in the enormous number of cases like it, is not

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[3] In fact, as the Petition stresses, the Supreme Court of Hawaii's refusal to accord any weight to Kekona's obvious motive temporarily to retract his 1980 trial testimony in 1982 in order "to receive a free trip back to Hawaii from his mainland prison" (Pet. at 13 (quoting Pet. App. 8a)), and therefore the plain conclusion that the 1982 retraction was in fact false, is error under *Wright* even if all the above is wrong, for underlying motives, at the time the out-of-court statement is made, are at least one of the factors to be weighed where, as is not the case here, the proffered testimony falls without a "firmly rooted" hearsay exception. 110 S. Ct. at 3150 (citing cases).

vindicated by the exclusion of past cross-examined testimony, but by the admission of the evidence that purportedly impeaches that testimony. *See* Pet. at 13-14. Here, these protective measures were fully implemented, and the jury reached a discriminating verdict convicting Respondent as an accomplice in the brutal murder of Paul Warford. The issue is weight, not admissibility, and, as to weight, Lincoln had his day in court before the triers of fact. The Hawaii Supreme Court erred in requiring Lincoln's retrial.

As the far-reaching judgment of the Supreme Court of Hawaii has no support in law, or logic, the petition should be granted.

III. CONCLUSION

For the reasons above and in the Petition, the Court should grant the petition and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case down for argument.

Because the Supreme Court of Hawaii did not have the benefit of *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Idaho v. Wright*, No. 89-260 (U.S. June 27, 1990). In any event, the Court should grant the State of Hawaii's petition for writ of certiorari.

Respectfully submitted, September 13, 1990.

WARREN PRICE, III*
Attorney General
State of Hawaii
**Counsel of Record*

JOHN C. BRYANT
STEVEN S. MICHAELS
Deputy Attorneys General
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Counsel for Petitioner

APPENDIX "H"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT STATE OF HAWAII

STATE OF HAWAII, vs. JOHN KALANI LINCOLN, Defendant.	CR. No. 90-1022

TRANSCRIPT OF PROCEEDINGS

Had before the HONORABLE MARIE N. MILKS, Judge, presiding Sixteenth Division, on Friday, September 7, 1990, in the above-entitled matter.

APPEARANCES:

JOHN BRYANT Deputy Attorney General State of Hawaii	For the State
ERIC A. SEITZ, ESQ.	For the Defendant

REPORTED BY:

Gwendolyn K. Correa, RPR, CSR 118
Official Court Reporter
State of Hawaii

FRIDAY, SEPTEMBER 7, 1990

(The case was called.)

(Appearances were noted.)

THE COURT: The record will note, Mr. Seitz, that I did receive from you the transcript of the proceedings before Judge McConnell on May 2nd consisting of seven

typed pages. And the Court will point out to you again, Mr. Bryant, that my impression of the documents was correct that Judge McConnell did indicate that he would grant the motion if he did not have an affidavit indicating that Mr. Kekona would be available and would testify in court. So that is confirmed by Judge McConnell's finding.

And the record will note that I've gotten through Volume 25 of the transcripts of the prior trial and I'm – there's still about ten more volumes to go through. So there's quite alot more reading for me to do. Do you wish any further argument?

MR. SEITZ: No.

MR. BRYANT: I have read the transcript of Judge McConnell's comments; and as noted in the transcript, I disagreed strenuously with his contention that without Kekona's testimony, we did not have enough to go forward. I still to this day believe that; and I respectfully submit, Your Honor, that it would be an abuse of discretion to grant this motion based upon the evidence that we could present at trial.

And, secondly, it's pure speculation at this point whether or not Anthony Kekona will or will not testify, especially in light of the sanctions that this Court can apply to him should he refuse a court order.

A big difference between this case and Moriwaki is the fact that in this case, two juries, Your Honor, have convicted the Defendant of the offense of murder. In Moriwaki, you had hung juries in that particular case. That is a significant difference, and I submit that this case is simply too serious and the crime too heinous for this

Court to dismiss based upon the grounds that the Defendant proferred.

I think the better alternative would be to wait and see what comes out in the State's case in chief. At that point in time, the Court has the authority and can exercise its discretion; and if so chooses, can dismiss or acquit at that particular point.

One final thing. If this Court is inclined to grant the Defendant's motion, the State is requesting that the decision and order be made after the United States Supreme Court rules on our petition for certiorari in which we've essentially asked the supreme court to review the State of Hawaii's decision reversing Lincoln's conviction.

We have spoken to the clerk's office at the United States Supreme Court. It is our understanding that this petition will be decided on later this month at their first conference, September 24th, and the order to issue the first Monday in October, which I believe is October 1st. That would cause the defense no prejudice. It will help to clarify the record.

If the Court grants this motion, obviously, trial will not go forward. If the United States Supreme Court elects to hear our petition, obviously, I don't think trial can go forward; and, therefore, we're making that request should this Court be inclined to grant the motion.

THE COURT: May I have a response, Mr. Seitz.

MR. SEITZ: Yes, I think the motion should be granted today. I think, frankly, it's quite clear to us that if we have to wait until October 1st, we're going to have to do enormous amount of work and go to great expense to

prepare for a murder case which will start trial on October 15th as it's presently scheduled.

At this point, Mr. Lincoln has been incarcerated for 11 years, and I think it's somewhat cavalier to say we should wait even a day longer when the only witness who's able and has ever identified him as a participant in these is now saying he's not going to testify. We've been through this so many times with Kekona. I think it borders on bad faith for Mr. Bryant to say again we should wait for Kekona, and Kekona should be determinative of how these proceedings should go.

I think Judge McConnell made it very clear that if the State could not assure that they would have Kekona's testimony, he intended to dismiss the case when we went back to him May 29th. They got an affidavit but they don't now, and I would request that based upon what is clearly stated in the record by Judge McConnell, based upon his appraisal of the record, his familiarity with the proceedings, and the affidavit, and his clear and unequivocal intention to dismiss the case, that the case should be dismissed and should not go forward; and Mr. Lincoln should not be able to be incarcerated.

THE COURT: I can make preliminary findings for counsel. I think it's important for you to understand why I said I had to finish reading the transcripts. Under State v. Moriwaki, the supreme court says that the trial court has to come to its own evaluation of relative case strength. And while I appreciate the supreme court's statement that without Kekona's testimony, the case is

flimsy, and while I respect and appreciate Judge McConnell's statement that he would grant the motion for dismissal, the law requires this Court to make its own evaluation.

And so even at this point, what I've read so far would lead me to grant the motion; and I'll state my reasons why. I think it's incumbent on me to complete a reading of the record. I think for me to rule without having viewed the entirety of the record would not be appropriate or proper. But based on what I've heard thus far and based on what I've read so far, subject to something happening between Volume 25 and the end of the second binder, the Court would be inclined to grant the motion to dismiss.

Now, let me tell you that, in addition to completing my reading of the transcript, State v. Moriwaki refers to the case of State v. Lundine, which is an Iowa Appellate Court decision. And in that case, twelve relevant considerations are listed. In Moriwaki there are six. I'd like to read the Lundine decision to see whether or not there may be other factors that can also apply to this case.

Let me tell you that I see a significant difference between the Moriwaki case and this case, and I feel that the facts under this case are worse than in the Moriwaki case. And the reason is in Moriwaki, there were two trials based on competent evidence, and the jurors in the cases could not honestly agree to the verdict.

In our situation, the supreme court has found that Kekona's testimony should not have been used and so the strength of this case, if it were to proceed to trial without Kekona's testimony, is weakened for the reason that, as I

read in Volume 22, the testimony of Genevieve Langford, her testimony to co-conspirators' statements were based on statements made in furtherance of the conspiracy. But that would require the establishment of the conspiracy, and we would need Kekona's testimony to establish it. So unlike the Moriwaki situation, if this case were to go to trial again and Kekona's testimony were not used, this Court would strike certain other witnesses; and the evidence would be weaker and more flimsy than what the supreme court had said.

I'd also like to point out that Kekona's credibility was questioned by the Hawaii Supreme Court; and subsequent to Judge McConnell's hearing, there were affidavits required or a deposition required of Mr. Kekona. Judge McConnell, as I read his transcript, required some affirmative steps to be taken by the prosecutor. Moriwaki talks about taking into account the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney. There's an affirmative duty that Judge McConnell placed upon the prosecutor. There was a choice between a deposition and an affidavit. The affidavit was the route taken, and the Court finds that there should have been other steps taken that were not taken.

Kekona's own testimony at the trial regarding his credibility, the affidavit which he has submitted, and the subsequent correspondence, make his testimony even more questionable.

The Court would also like to point out that with regard to the nature of the prosecutor's conduct, that is number six on the Moriwaki considerations.

And last but not least, the State has taken the position that this Court should wait and see whether or not Kekona testifies in court. That is not the affirmative kind of step that this Court feels that is required of a prosecution of a case.

And so based on everything I've seen thus far, I can assure counsel that this Court will not wait for the United States Supreme Court to decide because the motion before the Court is to take the case in the state it's in in the state's system. And in the event the supreme court disagrees with the Hawaii state court and chooses to reverse the Hawaii state court, the conviction would stand; and that would be up to the United States Supreme Court. But this Court will rule according to what the Court has before it, and I will hope to rule within the week. I will notify counsel. I've been trying to read the transcripts as quickly as I can, but I've had other matters to take care of. But the Court will make specific, and hopefully more articulate, findings regarding the Moriwaki requirements.

But at this time my indication to counsel is that I will more likely than not grant the motion to dismiss based on what I've seen. All right. Counsel will be notified.

(Proceedings concluded.)

STATE OF HAWAII)
)
CITY AND COUNTY OF)
HONOLULU)

I, GWENDOLYN K. CORREA, an Official Court Reporter for the First Circuit Court, State of Hawaii, do

hereby certify that the foregoing pages comprise a true and correct transcription of my stenographic notes taken in the above-entitled cause, to the best of my ability.

Dated this 11th day of September, 1990.

/s/ Gwendolyn K. Correa
GWENDOLYN K. CORREA,
RPR, CSR 118
Official Court Reporter

APPENDIX "I"

2375K
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII vs. JOHN KALANI LINCOLN, Defendant.	) CR. NO. 90-1022) STATE'S MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT; AFFIDAVIT OF JOHN C. BRYANT, JR.; EXHIBIT "A"; STATEMENT OF PROPOSED WITNESSES AND EXHIBITS; NOTICE OF HEARING OF STATE'S MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT AND CERTIFICATE OF SERVICE)) APPROXIMATE TIME: 2 hours) Hearing Date: 09/14/90) Hearing Time: 1:00 p.m. Judge: Marie N. Milks

STATE' MOTION FOR FURTHER HEARING ON DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL AND/OR DISMISSAL OF AMENDED INDICTMENT

(Filed Sep. 11, 1990)

Comes now the State of Hawaii, by and through its Deputy Attorney General, John C. Bryant, Jr., and hereby moves this Honorable Court to grant further hearing on Defendant's Renewed Motion for Judgment of Acquittal and/or Dismissal of Amended Indictment, due to the discovery on Monday, September 10, 1990, of additional evidence inculpating the Defendant in the murder of Paul Warford.

This Motion is brought pursuant to Rules 12 and 47, *Hawaii Rules of Penal Procedure*, the records and files in this case, the attached Affidavit of John C. Bryant, Jr., and whatever evidence or arguments that may be adduced at a hearing on this matter.

DATED: Honolulu, Hawaii, September 11, 1990.

/s/ John C. Bryant, Jr.
JOHN C. BRYANT, JR.
Deputy Attorney General
State of Hawaii

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII vs. JOHN KALANI LINCOLN, Defendant.	)	CR. NO. 90-1022 AFFIDAVIT OF JOHN C. BRYANT, JR.

AFFIDAVIT OF JOHN C. BRYANT, JR.

STATE OF HAWAII CITY AND COUNTY OF HONOLULU	) SS.	

JOHN C. BRYANT, JR., being first duly sworn upon oath, hereby deposes and says:

1. That he is the Deputy Attorney General assigned to prosecute this case, he is familiar with the facts and circumstances of the case, he is licensed and competent to practice in this Court, and he makes the representations contained in this Affidavit based upon personal knowledge;

2. That on Monday, September 10, 1990, Affiant received a phone call from a Margaret Tartt;

3. That based upon his conversation with Margaret Tartt, Affiant had George Kruse, Chief Investigator for the Department of the Attorney General, speak with Margaret Tartt;

4. That a true and accurate copy of the transcript of Chief Investigator Kruse's conversation with Margaret Tartt, is attached as Exhibit "A";

5. That Margaret Tartt indicated, among other things that Lincoln confessed his involvement in the murder of Paul Warford, stating to Margaret Tartt he, Lincoln, hired Kekona to kill Paul Warford so Warford's wife could collect the insurance money;

6. That this conversation between Lincoln and Margaret Tartt took place in Leavenworth, Kansas, in early August, 1990;

7. That the reason Margaret Tartt is coming forward at this time is because of threats she has received from Lincoln and others;

8. That Lincoln also indicated a scheme was afoot to pay, or take care of, Kekona to ensure his silence;

9. That Ms. Tartt is currently under round the clock protective custody by the Department of Attorney General;

10. That to broadcast her picture on television or publish her photograph in the newspaper may endanger her life; and

11. That, therefore, the State of Hawaii requests that the extended coverage be confined to audio recordings only, and not visual.

Further Affiant sayeth naught.

/s/ John C. Bryant, Jr.
JOHN C. BRYANT, JR.

Subscribed and sworn to before me
this 11th day of September, 1990.

/s/ Madelyn L. Derby
Notary Public, State of Hawaii
My commission expires: 10/30/93

[MATERIAL DELETED IN PRINTING]